87-575

Supreme Court, U.S.
FILED
OCT 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

*FREDERICK E. POPOVITCH
POPOVITCH & POPOVITCH, ESQS.
1601 Bay Avenue, P.O. Box 27
Point Pleasant, New Jersey 08742
201/295-1600

BERNARD J. DiMURO
HIRSCHKOP & ASSOCIATES, P.C.
108 N. Columbus St., P.O. Box 1226
Alexandria, Virginia 22313
703/836-6595

Counsel for Petitioners

*Counsel of Record

QUESTIONS PRESENTED

I. WHETHER CONSIDERATION OF ISSUES OF EQUITABLE TOLLING AND EQUITABLE ESTOPPEL, WHICH COULD MODIFY THE TIME LIMITATIONS IN THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), MAY BE PROPERLY DISPOSED OF BY A SUMMARY JUDGMENT WITHOUT A FULL EVIDENTIARY HEARING, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

II. WHETHER AN EMPLOYEE SHOULD BE BARRED FROM ANY EQUITABLE MODIFICATION OF THE ADEA TIMING REQUIREMENTS BECAUSE HE HAS CONSULTED AN ATTORNEY DURING THE PERTINENT PERIODS FOR REASONS UNRELATED TO ANY AGE DISCRIMINATION CLAIM, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Harold A. Morse and Richmond Sullivan, who were the individual plaintiffs in the consolidated cases below against the respondent, The Daily Press, Inc.

The Daily Press, Inc. is a wholly-owned subsidiary of The Tribune Company, Chicago, Illinois.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	vii
JURISDICTION.....	viii
STATUTES & REGULATIONS INVOLVED..	x
PETITION/STATEMENT OF THE CASE...	1,2
REASONS FOR GRANTING THE WRIT:	
I. The Fourth Circuit's approval of a summary judgment without a full evidentiary hearing to decide allegations of equitable tolling and equitable estoppel of ADEA timing requirements (A) procedurally conflicts with decisions in other Circuits dealing with similar issues and directly conflicts with a decision of the 10th Circuit with a similar fact situation; and (B) is based on plain error with regard to its resolution of the notice issue.....	11

Page

II. The Fourth Circuit's imposition of an automatic bar to any equitable relief for an employee who has consulted an attorney during the pertinent time periods of the ADEA, regardless of the fact that such consultations were unrelated to any age discrimination claim but were directly related to the employer's conduct, is (A) in conflict with some of the other Circuits; and (B) it impliedly supports the position that any attorney consulted by a person within the protected class under the ADEA for any reason during the pertinent time periods, may be held liable if he fails to recognize a possible age discrimination claim even when there is misleading conduct on the part of the employer..... 21

CONCLUSION..... 26

APPENDIX (Opinion and Judgment of the Court of Appeals, Memorandum Order and Opinion of the Eastern District Court of Virginia, and Order of the Eastern District Court of Virginia)..... 1a

TABLE OF AUTHORITIES

Page

Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) 20

Aronsen v. Crown Zellerbach, 662 F.2d 584, (9th Cir. 1981), cert. denied, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983) 13,15

Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978). 18

Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, reh. denied, 559 F.2d 1217 (5th Cir. 1977) 16

Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559 (11th Cir. 1987) . . . 14

Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd per curiam by an equally divided Court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977), reh. denied, 434 U.S. 1042, 98 S.Ct. 600, 54 L.Ed.2d 792 (1978) 22

Dillman v. Combustion Engineering, Inc., 784 F.2d 57 (2nd Cir. 1986). . 13

Earnhardt v. Com. of Puerto Rico, 691 F.2d 69 (1st Cir. 1982). 17

Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975). 23

	Page
Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982). .	13
Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978). . . .	16
Keyse v. California Texas Oil Corp., 590 F.2d 45 (2nd Cir. 1978).	22
Meyer v. Riegel Products, 720 F.2d 303 (3rd Cir. 1983), cert. dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984)	22,24
Pirone v. Home Ins. Co., 507 F.Supp. 1281 (S.D.N.Y. 1981), aff'd, 742 F.2d 1430 (2nd Cir. 1983).	14
Posey v. Skyline Corp., 702 F.2d 102 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983)	17
Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975) .	14
Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978).	22
Tucker v. United Parcel Service, 657 F.2d 724 (5th Cir. 1981)	14
Vance v. Whirlpool Corp., 707 F.2d 483 (4th Cir. 1983), cert. denied, 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130, cert. denied, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1984)	10
Wilkerson v. Siegfried Ins. Agency, 621 F.2d 1042 (10th Cir. 1980) . . .	12,13,15

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is presently reported at 823 F.2d 548 as a decision without a published opinion, but it is to be published. It is reprinted in the appendix hereto, p. 1a, infra.

The memorandum order of the United States District Court for the Eastern District of Virginia, Newport News Division, (MacKenzie, D.J.), dated July 17, 1986, has not been reported. It is reprinted in the appendix hereto, p.11a, infra. The Order and Opinion of the same court, entered September 6, 1985, has not been reported. It is reprinted in the appendix hereto, p.24a, infra.

JURISDICTION

Invoking federal jurisdiction under the provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621 et seq., the petitioners brought these suits in the Eastern District of Virginia on July 1, 1985. On September 16, 1985, the Eastern District Court consolidated the two cases, denied the respondent's motion to dismiss, and granted the petitioners' motion to amend their complaints. On July 17, 1986, the same court granted the respondent's motion for summary judgment and dismissed both actions.

On petitioners' appeal, the Fourth Circuit, on July 9, 1987, entered a judgment and an opinion affirming the Eastern District's orders. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. Section 626(d)(1). (d) Filing of charge with Commission; timeliness; conciliation, conference and persuasion.

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred.

29 U.S.C. Section 626(e)(1). (e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling.

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

29 U.S.C. Section 255(a) (The Portal-to-Portal Act statute of limitations).

(T)he cause of action...may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S. C. Section 627. Notices to be posted.

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of the chapter.

29 C.F.R. Section 1627.10. Notices to be posted.

Every employer...which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Commission or its authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

The petitioners, Harold A. Morse and Richmond Sullivan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above proceedings on July 9, 1987.

STATEMENT OF THE CASE

Petitioner, Harold A. Morse, was an employee of The Daily Press, Inc., for thirteen years before his discharge on September 30, 1982, when he was 61 years old. He was told by the respondent, his employer, that he was being terminated because the company was consolidating its staff and that, consequently, there was a reduction in force, which reduction included Mr. Morse. He accepted those reasons at the time. Mr. Morse had no suspicions that there might have been any age discrimination until, in late 1983, he learned that The Daily Press, Inc., had discharged a number of older employees and replaced them with younger employees. This led him to promptly file a complaint along with Richmond Sullivan. Mr. Morse was

named as a co-complainant on Mr. Sullivan's complaint filed with the EEOC on December 27, 1983. Mr. Morse received notice from the EEOC on December 18, 1984 that it had no plan to continue any conciliation efforts. He then filed the present suit on July 1, 1985.

Petitioner Richmond Sullivan was also an employee of The Daily Press, Inc. He was discharged after six years of employment, on June 6, 1982, at the age of 42. He understood that he was discharged for cause, but he did not question the employer at that time.

Mr. Sullivan filed for unemployment compensation benefits within a week of his discharge. When he learned that his former employer was contesting his unemployment benefits claim, he consulted an attorney in September of

1982. At the unemployment benefits hearing, he was accused of specific acts of misconduct, but the hearing officer ruled that there was insufficient evidence of cause to dismiss, i.e., sufficient to deny him unemployment benefits, partly because the employer's representatives had to admit that they had not informed him of some of the acts that they were alleging led to his dismissal.

In October of 1982, Mr. Sullivan consulted another attorney for the sole purpose of securing advice as to his right to institute a libel action against his former employer for what its representatives said about him at the unemployment compensation hearing.

Not until the following year did he begin to suspect that he might have been discharged because of his age. He saw a

newspaper article about an age discrimination case against The Daily Press, Inc., and spoke with some of his former acquaintances at the newspaper. He learned that many older employees had been discharged and that younger employees had been retained or hired to replace them. Mr. Sullivan promptly filed a charge with the EEOC on December 27, 1983, as noted above. He received the same notice from the EEOC on December 18, 1984, as Mr. Morse and filed this present action on July 1, 1985.

An initial Motion to Dismiss by the respondent on the basis that Mr. Morse had failed to timely file a charge with the EEOC sixty days before he filed his civil action was denied on the basis that the filing of a charge by Mr. Sullivan with Mr. Morse listed as a co-

complainant satisfied this filing requirement. In the same order, entered on September 16, 1985, the Eastern District Court denied the motion as to the two other time requirements of the ADEA, specifically, filing a charge with the EEOC within 180 days pursuant to 29 U.S.C. Section 626(d)(1) and filing a separate civil action pursuant to 29 U.S.C. Section 626(e)(1), as being premature since they were subject to equitable modification, and thus an evidentiary hearing might be necessary.

In a Memorandum Order dated and entered on July 17, 1986, the Eastern District Court granted the respondent's Motion for Summary Judgment on the following bases:

1) The Court found no genuine issue of material fact concerning equitable tolling, by finding that the posting of

a notice in an interior office of the employer's personnel department was a posting in a conspicuous place; and that 29 U.S.C. Section 627 did not require a posting in more than one place.

2) The Court rejected Morse's equitable estoppel argument based on the reasons given to him at the time of his discharge by the employer as a misrepresentation of the facts, because it noted that "nearly every discrimination case is occasioned by an employer defending his action with a nondiscriminatory justification." p. a infra.

3) The Court held that Sullivan's simply retaining an attorney, regardless of the reasons, was sufficient to bar any equitable relief; and

4) that 29 U.S.C. Section 626(e)(1)

bars any action filed beyond the two-year limitation unless there was a willful violation, and both plaintiffs had filed beyond that period.

On appeal, the Fourth Circuit affirmed in holding:

1) that 29 U.S.C. Section 627 and 29 C.F.R. Section 1627.10 did not require multiple notices;

2) that a notice was continuously displayed in an office in the personnel department, which the Court found to be a conspicuous place;

3) that there was no evidence of duplicity on the part of the employer;

4) that Sullivan's retention of an attorney shortly after his discharge to represent him on his unemployment claim extinguished any equitable reasons for tolling the time period of 29 U.S.C. Section 626(d)(1); and

5) that there was no genuine issue of material fact on the claim of willful discrimination and, consequently, both actions were untimely filed.

Both lower courts rejected out-of-hand the petitioners' claim for equitable estoppel based on the employer's conduct as to the stated reasons for their discharges, and appear to have totally ignored Sullivan's claims as to the charges made against him at the unemployment compensation hearing after his discharge.

On the notice issue, neither court referred to the admitted fact that the notice was posted in an interior office of the personnel department, i.e, in the office of the secretary to the Personnel Director; nor that there was a reasonable inference, based on the employer's evidence, that only employees

who intended to see the Personnel Director usually passed through his secretary's office.

Neither court made any reference to whether or not the time limitation of 29 U.S.C. Section 626(e)(1) was subject to equitable modification, probably because neither court found any reasons for equitable tolling or equitable estoppel.[1]

[1]It should be noted that the Fourth Circuit has held that "it is clear that the statute of limitations of 29 U.S.C. Section 255 (incorporated under Section 626(e)) may be equitably modified where circumstances warrant." (Cite omitted.) Vance v. Whirlpool Corp., 707 F.2d 483 (4th Cir. 1983), cert. denied, 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 cert. denied, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1984).

REASONS FOR GRANTING THE WRIT

I. WHETHER CONSIDERATION OF ISSUES OF EQUITABLE TOLLING AND EQUITABLE ESTOPPEL, WHICH COULD MODIFY THE TIME LIMITATIONS IN THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), MAY BE PROPERLY DISPOSED OF BY A SUMMARY JUDGMENT WITHOUT A FULL EVIDENTIARY HEARING, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

The Fourth Circuit's summary disposition of petitioners' equitable tolling and equitable estoppel claims without a full evidentiary hearing has deprived them, and all others similarly situated, of the protections of the ADEA.

Such a disposition prevents a full review of the issues of equitable modification and cuts off all chance of reviewing the merits of the employees' claims.

In the Tenth Circuit, in a factually similar case involving allegations that the act of the employer

concerning the reasons advanced for the employee's discharge was misleading, the Court of Appeals held that where an employee was first told that her position was being eliminated but later learned that her job was not only not abolished but that a younger person of the opposite sex had filled it, an evidentiary hearing was necessary and that summary judgment was inappropriate. Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980).

As to why such a hearing is necessary, that Court noted the following: "Whether a case warrants a finding of equitable tolling or estoppel almost invariably involves the credibility of the various witnesses. Credibility is difficult to determine from affidavits, or depositions." Id.

See also Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 718 (8th Cir. 1982) (Full evidentiary hearing held where employee did not contest that the notice was prominently posted but only that he had not seen it - a position which has universally failed to establish tolling.) Aronsen v. Crown Zellerbach, 662 F.2d 584, 595 (9th Cir. 1981), cert. denied, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed. 2d 431 (1983) (Followed Wilkerson.) But see Dillman v. Combustion Engineering, Inc., 784 F.2d 57 (2nd Cir. 1986) (Distinguishable because the record indicated that employee was aware of his rights at an early point within the required time periods.)

The Fourth Circuit, as did the District Court before it, failed to address Morse's equitable tolling

argument based on the fact that the reasons he was given by the employer for his discharge were misleading and he did not learn any facts that put him on alert as to the possibility of discrimination until long after the time periods had expired. In such circumstances other courts would apply equitable modification to statutes of limitation. "(T)he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975). See also Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559, 1561 (11th Cir. 1987); Tucker v. United Parcel Service, 756 F.2d. 724, 726 (th Cir. 1981); Pirone v. Home Ins. Co., 507

F.Supp. 1281, 1289 (S.D.N.Y. 1981), aff'd, 742 F.2d 1430 (2nd Cir. 1983).

Although it is admittedly difficult to establish a bright line in such cases as age discrimination, there is no reason to deprive an employee of a full evidentiary hearing if he raises issues of equitable tolling and equitable estoppel as to his failure to be aware of the discriminatory nature of his employer's act within the requisite time periods, especially when there is no evidence that he knew or should have known that the act was discriminatory. This is nothing more than a recognition of the judicial doctrine of fundamental fairness.

For this reason, the position of Wilkerson and Aronsen should be followed nationally. Furthermore, the Fourth Circuit's conclusion that the posting of

the notice was in a conspicuous place is plain error. 29 U.S.C. Section 627 and 29 C.F.R. Section 1627.10 require that any notice be posted in "conspicuous places." It must give the employees, not just the applicants for employment, "a meaningful opportunity of becoming aware of their ADEA rights so that one may reasonably conclude that the employees either knew or they should have known of their statutory rights." Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, 764, reh. denied, 559 F.2d 1217 (5th Cir. 1977). See Kephart v. Institute of Gas Technology, 581 F.2d 1287, 1289 (7th Cir. 1978). Many courts have held that failure to post such notice tolls the 29 U.S.C. Section 626(d)(1) period until the employee acquires actual knowledge of his statutory rights or seeks an attorney,

discussed, infra at 21-25. See e.g., Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983). On considering the issue of adequate posting to meet the statutory requirements, the First Circuit Court of Appeals has established the following list of questions to be considered:

> In addressing an equitable claim based upon an asserted failure to post...a court must consider a potentially endless combination of questions. Did the employer post notices anywhere? If so, were they posted conspicuously? In one building but not another? On every floor? If not, did the employee have actual or constructive knowledge of his rights?

Earnhardt v. Com. of Puerto Rico, 691 F.2d 69, 73 (1st Cir. 1982). It should be noted that in that case, the Court vacated the summary judgment and remanded the case to the District Court

for an evidentiary hearing on this issue. Id. See also Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978).

In the present case, the employer's evidence which established conclusively that the notice, whether it contained any information about the ADEA at all,[2] was in an inner office of the Personnel Department, situated between an outer office, where applicants for employment filled out the necessary forms, and the Personnel Director's office. In her deposition, the Personnel Director's secretary who had occupied the office in

---

[2] The poster displayed at the time of the petitioners' discharges had been destroyed, and the secretary who occupied the office in which it was displayed could not remember if it referred to ADEA rights.

which the posters regarding discrimination rights have been displayed, admitted that employees read the posters "when they are waiting to get in to talk to the Personnel Director. Probably just for something to do." App. at 97.[3] A reasonable inference from this evidence is that access to this inner office by employees as opposed to applicants is predicated on the need to see the Personnel Director. In a motion for summary judgment, the moving party has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party."

---

[3] Refers to the Joint Appendix prepared by the parties for the appeal to the Fourth Circuit.

Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Here, the Fourth Circuit ignored the reasonable inferences and, in fact, did not even note where the office was exactly located in deciding that it satisfied the statutory requirements. This is plain error. At the least, the petitioners should be permitted to present evidence at a hearing that this was not a conspicuous place, through the testimony of current and former employees familiar with the employer's operations.

II. WHETHER AN EMPLOYEE SHOULD BE BARRED FROM ANY EQUITABLE MODIFICATION OF THE ADEA TIMING REQUIREMENTS BECAUSE HE HAS CONSULTED AN ATTORNEY DURING THE PERTINENT PERIODS FOR REASONS UNRELATED TO ANY AGE DISCRIMINATION CLAIM, AND AS TO WHICH THERE IS CONFLICT AMONG THE COURTS OF APPEALS.

On the issue of the consultation of an attorney during the pertinent ADEA time periods for any reason, as an absolute bar to equitable modification presumably on the theory that such consultation imputes constructive knowledge to the client as to his statutory rights under the ADEA, there is a split of authority among the Circuit Courts. Most Circuit Courts in ADEA cases do not apply such a blanket application of the rule of constructive knowledge in cases where discrimination is not suspected by the employee at the time of the consultation.[4] "Rather, they

[4] It should be noted that there is some support for the Fourth Circuit's position among the District Courts.

for the most part stand for the laudable notion that a plaintiff who has consulted with an attorney about a potential discrimination claim will not get away with complaining that he failed to understand the requirements and implications of the statute." Meyer v. Riegel Products, 720 F.2d 303, 308 (3rd Cir. 1983), cert dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). See also Keyse v. California Texas Oil Corp., 590 F.2d 45 (2nd Cir. 1978); Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978); compare Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided Court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977) reh. denied, 434 U.S. 1042, 98 S.Ct. 600, 54 L.Ed.2d 792 (1978) (Employee actually "twice promptly sought private legal

advice and twice promptly followed that advice," id. at 1261, and still was not barred by her first contact with an attorney during the pertinent time period because the contact was quite brief and she followed his advice and filed a complaint with the Department of Labor); but see Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975) (Employee contacted attorney about his "legal rights" upon discharge and attorney failed to advise him of his statutory rights under the ADEA.)

In a case where the reasons given by the employer for the employee's discharge were misleading, even when he requested clarification so that he and his lawyer doubted that he had a valid age discrimination claim, the Court refused to bar equitable relief,

reversed the summary judgment and remanded the case for trial. Meyer v. Riegel Products, 720 F.2d at 309. That Court described the employee's position as follows:

> Where a defendant misleads a plaintiff he may also mislead plaintiff's lawyer, and in such a case the alleged fraud supersedes the results that ordinarily flow from consultation with an attorney. Such an interpretation of the case law seems to be precisely what we had in mind in Bonham, in which plaintiff had secured counsel, when we nevertheless remarked that "cases may arise where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempt to vindicate his rights."

Id. In such cases, the absolute bar rule would favor employers who have engaged in misleading conduct and relieve them of any legal consequences of such conduct. It would also penalize employees who failed to retain attorneys who are experienced in the area of age

discrimination law.

Furthermore, application of this rule has a negative impact on the attorneys consulted for nondiscrimination-related reasons, possibly leaving them vulnerable to legal malpractice claims or the loss of clients. To avoid such consequences, they would have to screen all clients between the ages of forty and seventy for potential age discrimination cases.

For all of these reasons, the absolute bar rule applied by the Fourth Circuit court of Appeals should be abolished, and each case should be considered on its facts with the requisite balancing of the equities.

CONCLUSION

For all of the above reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK E. POPOVITCH
POPOVITCH & POPOVITCH
1601 Bay Avenue
P.O. Box 27
Point Pleasant, NJ 08742
(201)295-1600
Counsel of Record

October 7, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2125(L)

Harold A. Morse,

Plaintiff - Appellant,

versus

The Daily Press, Inc., a Corporation of the Commonwealth of Virginia,

Defendant - Appellee.

No. 86-2126

Richmond Sullivan,

Plaintiff - Appellant,

versus

The Daily Press, Inc., a Corporation of the Commonwealth of Virginia,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, Senior District Judge. (CA-85-000-N).(85-0101-N)

Argued: April 7, 1987 Decided: July 9, 1987

Before WIDENER, and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Frederick Edward Popovitch (Popovitch & Popovitch; Bernard J. DiMuro; Hirschkop & Associates, P.C. on brief) for Appellants; Robert B. Delano, Jr. (Henry M. Massie, Jr.; Sands, Anderson, Marks & Miller; Gregory P. Schermer; Hanson, O'Brien, Birney & Butler on brief) for Appellee.

PER CURIAM:

Appellants Richmond Sullivan and Harold A. Morse brought these suits against the Daily Press, Inc. pursuant to the provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. Sections 621 through 634 (1985 and Supp. 1987). Summary judgment was granted in favor of the employer because neither appellant complied with the ADEA's time limitations, and, despite appellants' contention that the required notice of rights was inadequately posted, there were no grounds to toll the ADEA's time limitations under either the theory of equitable tolling or the theory of equitable estoppel. We find that the district court properly granted summary judgment and affirm.

I

A charge with the Equal Employment Opportunity Commission (EEOC) must be filed

within 180 days after the alleged unlawful practice occurred. An individual may not commence a civil action under the ADEA until sixty days after a charge alleging unlawful discrimination has been filed with the EEOC. 29 U.S.C. Section 626(d) (1985). An individual's right to bring a private civil action terminates if the EEOC begins an action to enforce the rights of the individual. 29 U.S.C.A. Section 626(c)(1) (1985).

Sullivan and Morse filed their charge with the EEOC on December 27, 1983, more than a year and a half beyond Sullivan's discharge on June 7, 1982 and nearly a year and three months beyond Morse's discharge on September 30, 1982. Both appellants contend their firing was based on age discrimination, yet present no reason why they would not have been aware of this alleged discrimination on the date of thier discharge. Clearly, each

cause of action accrued on the date of appellant's discharge. Both charges were filed well beyond the 180-day period for filing claims with EEOC. Despite the fact that they have failed to comply with the filing requirements of the ADEA, appellants contend that their civil action should be allowed under either the doctrine of equitable tolling or the doctrine of equitable estoppel.

Equitable tolling and equitable estoppel are separate methods of modifying the ADEA's 180-day limitation period. Equitable tolling focuses on the claimant's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the employer's conduct and the extent to which the claimant has been induced to refrain from exercising his rights. Felty v. Graves-Humphreys Co., 785 F.2d 516, 519 (4th Cir. 1986).

Appellants base their equitable tolling argument upon allegations that The Daily Press failed to satisfy its statutory obligation to post in conspicuous places notice of employees' rights under the ADEA as required by 29 U.S.C.A. Section 627 (1985). Appellants contend that, because both the statute and the implementing regulation require that the notice be posted in "conspicuous places" more than one notice is required. See 29 U.S.C.A. Section 627 (1985); 29 C.F.R. Section 1627.10. This argument in semantics is not persuasive. The statute and the regulations similarly refer to "a notice". 29 U.S.C. Section 627 and 29 C.F.R. Section 1627.10. The purpose of the statute is not that notice be posted in every individual office or work room, or on every available bulletin board. Notice is sufficient if it is posted conspicuously so that employees have a meaningful opportunity

for becoming aware of their ADEA rights. A single posting of notice is sufficient to satisfy 29 U.S.C. Section 627, if that posting is in a centrally located area where employees are likely to see it. See Bomberger v. Consolidated Coal Company, 623 F. Supp. 89, 92 (W.D.Pa. 1985); Keitz v. Lever Brothers Company, 563 F. Supp. 230, 235 (N.D.Ind. 1983).

It is undisputed that a notice of rights has been continuously displayed in the personnel office of The Daily Press from 1974 to the present. The office is open to the general public. The evidence indicates that applicants for employment and employees routinely stop and read the notice. No other documents were placed on the wall in question, and there is an unobstructed view of the notice. The district court correctly held that this notice is conspicuous as required by 29 U.S.C.A. Section 627.

Appellants contentions that equitable estoppel should be applied to the 180-day limitation because of acts by The Daily Press which allegedly induced them to refrain from exercising their rights are equally without merit. Appellants have simply presented no evidence showing duplicity on the part of The Daily Press. Appellant Sullivan retained an attorney shortly after his discharge to represent him on his employment uncompensation claim. In October 1982 he contacted another attorney to discuss his discharge. Retaining an attorney extinguishes the equitable reasons for tolling the 180-day period. Edwards v. Kaiser Aluminum, 515 F.2d 1195 (5th Cir. 1975).

II

Under the ADEA, a private action may only be commenced within two years after the date upon which the cause of action

accrues, unless there is a showing that such cause of action arose out of a willful violation of the act, then such action may be commenced within three years after the cause of action accrues. 29 U.S.C. Section 626(e)(1) (1985) (incorporating 29 U.S.C. Section 255 (1985)). Both Sullivan and Morse filed thier actions on July 1, 1985. As previously mentioned, the causes of action accrued on the date of each appellant's discharge; therefore, Sullivan filed his claim over three years after his alleged cause of action accrued, and Morse filed his claim over two and a half years after his alleged cause of action accrued. Appellants have created no genuine issue of material fact on their claim of willfully discrimination; therefore, each claim is barred by the statute of limitations. 29 U.S.C. Section 626(e)(1).

The decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

RICHMOND SULLIVAN, Plaintiff	]	
v.	]	CIVIL ACTION NO. 85-101-NN
THE DAILY PRESS, INC., Defendant	]	
HAROLD A. MORSE, Plaintiff	]	
v.	]	CIVIL ACTION NO. 85-100-NN
THE DAILY PRESS, INC., Defendant	]	

MEMORANDUM ORDER

On September 16, 1985, the Court denied the defendant's motion to dismiss Morse's complaint for allegedly failing to file an EEOC charge. The Court held in abeyance the defendant's motions to dismiss both Morse and Sullivan for noncompliance with ADEA's time limitations and granted the

plaintiffs leave to amend their complaints to allege equitable tolling and willful violations of ADEA. The plaintiffs amended their complaints and the defendant renews and enlarges its motions for summary judgment. For the reasons set forth below, the Court GRANTS the defendant's motions and DISMISSES both actions.

In analyzing a summary judgment motion, the Court views all factual inferences in favor of the nonmoving party and may grant the motion only if the evidence fails to present a genuine issue of material fact. To establish a "genuine" issue for trial, however, the plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 54 U.S.L.W. 4319, 4322 (U.S. March 26, 1986). In the present case, the Court finds that no genuine factual

dispute exists and that the defendant is entitled to judgment because the plaintiffs failed to comply with ADEA's time limitations.

ADEA's 180-Day Requirement

ADEA requires that an aggrieved employee file an EEOC charge within "180 days after the alleged unlawful practice occurred . . . ." 29 U.S.C. § 626(d)(1). Sullivan and Morse filed their charge on December 27, 1983, more than a year and a half beyond Sullivan's discharge on June 7, 1982 and nearly a year and three months beyond Morse's discharge on September 30, 1982. Both charges, therefore, were well beyond the 180-day period.

The plaintiffs seek to escape summary judgment by asserting that the defendant allegedly failed to post a conspicuous ADEA notice and thereby equitably tolled the 180-day period. In addition, Morse

asserts that the defendant "actively misled" him by stating that his discharge resulted from a reduction-in-force policy. This alleged misrepresentation, Morse contends, equitable estopped the defendant from raising this issue. The defendant, however, argues that neither ground has any factual support and that summary judgment should enter.

Equitable tolling and equitable estoppel are separate methods of modifying ADEA's 180-day requirement. Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights. Felty v. Graves-Humphreys Co., _____F.2d _____, slip op. at 8 (4th Cir. March 7, 1986). In the present case, neither method applies to modify the 180-day period.

First, the plaintiffs fail to raise a genuine issue of material fact concerning equitable tolling. The deposition and affidavit testimony of Donald Blankenship, the defendant's personnel director, and Joanne Keating, the personnel secretary, demonstrates that a notice of rights has been continually displayed in a conspicuous place in the personnel office from 1974 to the present. They further testify that (1) the office is open to the general public; (2) applicants and employees routinely stop and read the notice; (3) no other documents were placed on the wall; and (4) the public has an entirely unobstructed view of the notice. The defendant also submits two photographs that depict the present notice in a conspicuous place in Keating's office in the same manner as it has existed since 1974, and as it existed in 1982.

In response, the plaintiffs submit affidavits which state that they never actually viewed the notice; yet, significantly, none of the affidavits contend that the defendant did not post the notice as suggested by Blankenship and Keating. This response does not attempt to refute the defendant's position and, therefore, falls far short of presenting an issue of fact concerning the posting of the notice in the personnel office. Vaught v. R. R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984); Posey v. Skyline Corp. 702 F.2d 102 (7th Cir.), cert. denied, 464 U.S. 960 (1983).

The plaintiffs also argue that ADEA requires multiple notices and that the failure to post more than one notice tolls the 180-day period. No relevant case law has stretched the logic of equitable tolling to this extent, and the Court notes that

the leading case in the circuit, Vance v. Whirlpool Corp., 716 F.2d 1010 (4th Cir. 1983), repeatedly refers to the requirement of posting "a notice". See also Keitz v. Lever Brothers Co., 563 F.Supp. 230 (N.D. Ind. 1983); Butz v. Hertz Corp., 554 F.Supp. 1178 (W.D. Pa. 1983); Hay v. Wells Cargo, Inc., 596 F.Supp. 635 (D. Nev. 1984). The Court, therefore, rejects this assertion as an implausibly rigid extension of the doctrine of equitable tolling.

Second, equitable estoppel results if "an employer engages in activety that it knows or reasonably should know will cause an employee to delay the filing of a discrimination complaint . . . ." Felty, _____F.2d ____, slip op. at 10. To implicate equitable estoppel, the defendant typically must engage in some sort of fraud, e.g., promising to rehire the employee, yet actually trying

to delay a discrimination charge, Franci v. Avco Corp., Avco Lycoming Division, 538 F. Supp. 250 (D. Conn. 1982).

Morse asserts that the defendant "misrepresented" the nature of his discharge by advising him that a reduction-in-force policy justified the defendant's actions. The Court must reject this contention because nearly every discrimination case is occasioned by an employer defending his action with a nondiscriminatory justification. By itself, this conduct cannot rise to a level of wrongdoing sufficient to free the employee of complying with the statutory filing requirements. Moreover, in Felty, the United States Court of Appeals for the Fourth Circuit analyzed an analogous fact pattern and made no mention that merely informing the employee "that there would be reductions in the work force" would itself implicate equitable estoppel. The

Court, therefore, finds no merit in Morse's position.

Even if equitable considerations toll the 180-day period, this tolling expires when the employee either obtains "actual knowledge of his rights or retains an attorney." Vance, 716 F.2d at 1013 (emphasis added). In Sullivan's case, it is uncontested that he retained attorney Allen Maust to represent him before the Virginia Employment Commission within three months of his discharge. In addition, Sullivan contacted another attorney in October of 1982 to discuss the facts surrounding the discharge.

Sullivan claims that he discussed only unemployment compensation and libel issues with his attorneys and that neither attorney advised him of his ADEA rights. The weight of authority, however, holds that simply retaining an attorney extinguishes the

the equitable reasons for tolling the 180-day period. See Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975) ("we are unwilling to charge against the employer the inaction of appellant's attorneys"); Downie v. Electric Boat Division, 504 F.Supp. 1082 (D. Conn. 1980; see also Saunders v. Duke University, 538 F.Supp. 1143, 1146 n.2 (M.D.N.C. 1982). Indeed, the force of Sullivan's argument would render superfluous the "or retains an attorney" language of Vance. If the attorney must advise the plaintiff of his ADEA rights, then the tolling expiration would merely be when the employee obtains "actual knowledge of his rights", albeit in some cases from his attorney. Accordingly, the Court rejects this view and holds that Sullivan's retention of Maust would extinguish any tolling which would otherwise be available.

ADEA's Statute of Limitations

ADEA's statute of limitations bars actions filed beyond two years, except for cases alleging a willful violation for which the limitation extends to three years. See 29 U.S.C. § 626(e)(1) (incorporating Portal-to-Portal Act, 29 U.S.C. § 255(a)). Although the Court's earlier order held in abeyance the defendant's motion to dismiss on limitation grounds, it raised 29 U.S.C. § 626(e) (2) as an applicable provision to toll the repose while the "Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation . . ."

The defendant asserts that tolling for administrative conciliation efforts occurs only in cases prosecuted by the EEOC, not in cases brought by private plaintiffs such as Sullivan and Morse. Several courts have followed this view, and upon reconsider-

ation, the Court holds administrative tolling inapplicable to private suits. See Leite v. Kennecott Copper Corp., 558 F.Supp. 1170 (D.C. Mass.), aff'd 720 F.2d 658 (1st Cir. 1983); Hovey v. Lutheran Medical Center, 516 F.Supp. 554 (E.D.N.Y. 1981). Because Sullivan brought this action beyond the maximum three year limitations, the Court dismisses his suit pursuant to 29 U.S.C. § 626(e)(1). Because Morse filed his action beyond two years yet before three years, the Court dismisses his non-willful ADEA claims.

In sum, ADEA requires an employee (1) to file an EEOC charge within 180 days of the discharge, and (2) to file a lawsuit within two years of a non-willful violation and within three years of a willful violation. Neither Sullivan nor Morse complied with the 180-day requirement or the two year statute of limitations. In addition, Morse

failed to satisfy the three year limitation on claims of willful ADEA violations. Accordingly, the Court GRANTS the defendant's motions for summary judgment and DISMISES both actions.

It is so ORDERED.

/s/ John A. Mackenzie
United States District Judge

Norfolk, Virginia
September 13, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

HAROLD A. MORSE, Plaintiff	]	
v.	]	
THE DAILY PRESS, INC., Defendant	]	CIVIL ACTION NO. 85-100-NN

RICHMOND SULLIVAN, Plaintiff	]	
v.	]	
THE DAILY PRESS, INC., Defendant	]	CIVIL ACTION NO. 85-101-NN

ORDER

On July 1, 1985, Morse and Sullivan filed separate suits against their former employer, The Daily Press, Inc., for violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Because both actions raise common questions of

law and fact, we CONSOLIDATE the suits into one action to avoid unnecessary costs or delay. See Fed. R. Civ. P. 42(a).

The Daily Press discharged Sullivan on June 7, 1982 and Morse on September 30, 1982. On December 27, 1983, Sullivan filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging violations of ADEA. On a third-party certification of charge form supplied to Sullivan by the EEOC, Sullivan listed Morse as an additional aggrieved person. The EEOC did not act upon the charges until December 18, 1984, when it determined that the ADEA violation was not substantiated.

Sullivan and Morse filed suit on July 1, 1985. The Daily Press moves to dismiss Sullivan's claim on the grounds that ADEA's statute of limitations provision governing non-willful violations bars the action. The Daily Press moves to dismiss Morse's

claim because, allegedly, Morse failed to file an EEOC charge as required by ADEA. The Daily Press also moves to dismiss both complaints for failure to comply with ADEA's procedural requirement that the EEOC charge be filed within 180 days of the alleged unlawful practice. Plaintiffs move this Court to grant leave to amend their complaints to show equitable considerations excusing their noncompliance.

First, ADEA contains a provision that no civil action may be commenced alleging violations of the act until 60 days after an EEOC charge has been filed. The defendant claims that since Morse failed to file an EEOC charge he is thus precluded from bringing suit. We disagree. Sullivan's primary charge with the EEOC stated that the Daily Press systematically discharged him and other members of a class. The EEOC form used by Sullivan for his claim,

entitled "Third Party Certificate of Charge," also names Morse as a complainant and gives his address. On the form, Sullivan certifies that the "individual named herein [Morse] is aware of the charge and that it has been lodged in [his] behalf as a person claiming to be aggrieved."

The Code of Federal Regulations defines a charge as a "statement filed with the Commission by or on behalf of an aggrieved person . . . ." 20 C.F.R. § 1626.3 (emphasis added). The Code further states that the procedural regulations "shall be liberally construed to effectuate the purposes and provisions of [ADEA] . . . ." 20 C.F.R. § 1626.19. In light of the EEOC regulations, we hold that Morse satisfied the requirement of filing a charge at least 60 days before filing suit. The Daily Press's motion to dismiss Morse's claim on grounds that no charge had been filed is DENIED.

Second, ADEA incorporates by reference the statute of limitations found in the Portal-to-Portal Act, 29 U.S.C. § 255. The statute bars suits brought more than two years after the accrual of the cause of action based on a non-willful ADEA violation. For causes of action based on willful violations, the statute provides a three year statute of limitations.

The defendant moves to dismiss Sullivan's claim because more than three years have elapsed between Sullivan's dismissal on June 6, 1982 and his filing of this suit on July 1, 1985. However, a tolling provision of 29 U.S.C. § 626(e)(2) states, "For the period during which the Secretary is attempting to effect voluntary compliance with the requirements of this Act through informal methods of conciliation . . . the statute of limitations as provided in section 6 of the Portal-to-Portal Act

of 1947 shall be tolled . . . ." Sullivan filed his EEOC charge on December 27, 1983. The EEOC processed the charge and on December 18, 1984 it determined that the ADEA violation was not substantiated. The tolled period under 29 U.S.C. § 626(e)(2) is 11 months and 21 days. Such tolling reduces the total period to 2 years, 1 month, and 3 days. Sullivan's claim therefore survives the statute of limitations unless he can allege and prove willful violation of ADEA. Defendant's motion to dismiss on this account will be held in ABEYANCE pending the filing of an amended complaint and the subsequent action hereinafter set forth.

Third, The Daily Press moves to dismiss both Sullivan and Morse for failure to comply with ADEA's timely-charge requirement that states, "No civil action may be commenced by an individual under this section until 60 days after a charge . . . [s]uch

a charge shall be filed (1) within 180 days after the alleged unlawful practice occured . . . ." 29 U.S.C. § 626(d)(1). The EEOC charge was filed on December 27, 1983 which comes 1 year, 6 months, and 21 days after Sullivan's discharge and 1 year, 2 months, and 27 days after Morse's discharge. In other words, the charges were filed far more than 180 days after the alleged unlawful practice.

Plaintiffs claim, however, that equitable considerations may exist which may toll the 180 day period. We recognize that the 180 day provision of § 626(d) does not operate as a jurisdictional prerequisite to suit in federal court, and may be tolled or waived under exceptional circumstances. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1981); Green v. Whirlpool Corporation, 708 F.2d 128 (4th Cir. 1983). On the record as it now stands, however,

there is no evidence of such exceptional circumstances that would justify tolling for such a long period. Nevertheless, plaintiffs shall have thirty (30) days from this date to amend their complaint to allege facts implicating equitable tolling. We will hold in ABEYANCE the Daily Press's pending motion to dismiss on grounds that the plaintiffs have not satisfied the 180 day requirement. The motion can be renewed for action if and when the plaintiffs have filed an amended complaint. We foresee that an evidentiary hearing may be necessary to determine the propriety of equitable tolling.

In sum, we DENY defendant's motion to dismiss Morse for failure to file an EEOC charge, holding instead that Sullivan's third-party certification complied sufficiently with ADEA's requirements. We hold in ABEYANCE defendant's motion to dismiss

Sullivan on statute of limitations grounds pending the action hereinabove described. We hold in ABEYANCE defendant's motion to dismiss both Sullivan and Morse for failure to file their EEOC charge within the 180 day period pending action as hereinabove described. Plaintiffs' motions for leave to amend their complaint within thirty (30) days is GRANTED. The Court will reconsider the defendant's motions thereafter.

It is so ORDERED.

/s/ John A. Mackenzie
United States District Judge

Norfolk, Virginia
September 13, 1985.

Supreme Court, U.S.
FILED
NOV 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-575

IN THE

Supreme Court of the United States

October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

BRIEF OF THE DAILY PRESS, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Robert B. Delano, Jr.
(Counsel of Record)
Henry M. Massie, Jr.
SANDS, ANDERSON, MARKS & MILLER
P. O. Box 1998, 801 East Main Street
Richmond, Virginia 23216-1998
(804) 648-1636

Gregory P. Schermer
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth Street, NW
Washington, DC 20006
(202) 298-6161

Counsel for Respondent
The Daily Press, Inc.

APPELLATE PRINTING SERVICES, INC. HERITAGE BLDG. RICHMOND, VA (804) 643-7789

QUESTIONS PRESENTED

The following issues are raised in the questions presented in the petition:

1. Did the District Court properly grant the Daily Press' Motions for Summary Judgment in view of the plaintiffs' failure to put forth specific facts showing that a genuine issue of material fact remained for trial or an evidentiary hearing?

2. Did the District Court properly rule that plaintiffs had failed to file their civil actions within the requisite statute of limitations periods?

3. Did the District Court properly rule that the administrative tolling provision of 29 U.S.C. §626(e)(2) is inapplicable to these private civil actions?

4. Did the District Court properly reject Morse's attempted modification of the 180 day EEOC filing period through equitable estoppel?

5. Did the District Court properly rule that plaintiffs had failed to prove noncompliance by the Daily Press with the posting requirement of 28 U.S.C. §627?

6. Did the District Court properly rule that Sullivan's action was time-barred due to Sullivan's failure to file his EEOC charge within 180 days of first retaining counsel?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
STATUTORY PROVISIONS AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	14
ARGUMENT:	
I. THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT BECAUSE PLAINTIFFS FAILED TO PUT FORTH SPECIFIC FACTS SHOWING THAT A GENUINE ISSUE OF MATERIAL FACT REMAINED FOR TRIAL OR AN EVIDENTIARY HEARING.	17
A. The District Court properly ruled that the plaintiffs had failed to file their civil actions within the requisite statute of limitations periods.....	18

B. The District Court properly ruled that the administrative tolling provision of 29 U.S.C. § 626(e)(2) is inapplicable to these private civil actions..... 27

C. The District Court properly rejected Morse's attempted modification of the 180 day EEOC filing period through equitable estoppel..... 30

D. The District Court properly ruled that plaintiffs failed to prove noncompliance by the Daily Press with the posting requirement of 28 U.S.C. § 627..... 34

II. THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT BECAUSE SULLIVAN'S ACTION WAS TIME-BARRED DUE TO HIS FAILURE TO FILE HIS EEOC CHARGE WITHIN 180 DAYS OF FIRST RETAINING COUNSEL..... 40

CONCLUSION..... 53

TABLE OF AUTHORITIES

Case — Page

Adickes v. S.H. Kress & Co
398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). 18

Akron Presform Mold Co. v. McNeil Corp
496 F.2d 230 (6th Cir.), cert, denied, 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974) 26

Albano v. General Adjustment Bur., Inc., 478 F. Supp. 1209 (S.D.N.Y. 1979) aff'd, 622 F.2d 572 (2nd Cir. 1980) 42,44

Anderson v. Liberty Lobby, Inc., 477 U.S. ___, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). 20, 21,24,38

Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981), cert. denied, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983) 22,23,39

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed. 2d 196 (1984)..... 32

Bennett v. Russ Berrie & Co., Inc., 564 F. Supp. 1576 (N.D. Ind. 1983) 42

Bomberger v. Consolidated Coal Co., 623 F. Supp. 89 (W.D. Pa. 1985)..... 37,39

Brudne v. Amalgamated Trust & Savings Bank, 627 F. Supp. 458 (N.D. Ill. 1986)..... 37

Butz v. Hertz Corp., 554 F.Supp. 1178 (W.D. Pa. 1983) 37,39

Byers v. Follmer Trucking Co., 763 F.2d 599 (3rd Cir. 1985)..... 37,39

Celotex Corp. v. Catrett, 477 U.S. ___, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....21,22,23,24

Cole v. CBS, Inc., 634 F. Supp. 1558, 1564 (S.D.N.Y. 1986)..... 42

Comfort v. Rensselaer Polytechnic Institute, 575 F. Supp. 258 (N.D.N.Y. 1983)..... 42

Davis v. United Fruit Company, 402 F.2d 328 (2nd Cir. 1968), cert. denied, 393 U.S. 1085, 89 S.Ct. 869, 21 L.Ed.2d 778 (1969)..... 45

Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd by an equally divided court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977) 47,48,49,50

Dillman v. Combustion Engineering, Inc, 784 F.2d 57 (2d Cir. 1986)..... 32

Downie v. Electric Boat Division, 504 F. Supp. 1082 (D. Conn. 1980) 37,42,44,46

Earnhardt v. Com. of Puerto Rico, 691 F.2d 69 (1st Cir. 1982),..... 22,23

Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 525 F.2d 1195 (5th Cir. 1975)....41,41,43,46,47

English v. Pabst Brewing Co, 645 F. Supp. 186 (W.D.N.C. 1986), aff'd, 828 F.2d 1047 (4th Cir. 1987) 32,33,37

Felty v. Graves Humphrey Co, 785 F.2d 516 (4th Cir. 1985)..... 31,33

Franci v. Avco Corp., 538 F. Supp. 250 (D. Conn. 1982)..... 31

Fulton v. NCR Corp., 472 F.Supp. 377 (W.D.Va. 1979)..... 27

Gibbs v. Pepsico, Inc., 25 F.E.P. Cases 661 (E.D. Mich. 1981).. 25,37

Giles v. Carlin, 641 F.Supp. 629 (E.D. Mich. 1986)..... 38

Greene v. Whirlpool Corp., 708 F.2d 128 (4th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 1707, 79 L.Ed.2d 171 (1984)..... 51

Hay v. Wells Cargo, Inc., 596 F.Supp. 635 (D. Nev. 1984)..... 44

Hovey v. Lutheran Medical Center, 516 F.Supp. 554 (E.D.N.Y. 1981)... 27

Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982)..... 22,23,37,39

Jacobs v. College of William and Mary, 495 F. Supp. 183 and 571 F. Supp. 791 (E.D. Va. 1980), aff'd, 661 F.2d 922 (4th Cir. 1981)..... 9

Jacobson v. Pitman-Moore, Inc., 624 F. Supp. 937 (D. Minn. 1985), aff'd, 786 F.2d 1172 (8th Cir. 1986)... 45

Kazanzas v. Walt Disney, 704 F.2d 1527 (11th Cir.), cert. denied, 464 U.S. 982, 104 S.Ct. 425, 78 L.Ed.2d 360 (1983)..... 30

Keitz v. Lever Bros. Co., 563 F.Supp. 230 (N.D. Ind. 1983).....37,39

Keyse v. California Texas Oil Corp., 590 F.2d 45 (2nd Cir. 1978) 42,44,49

Larson v. American Wheel and Brake, Inc., 610 F.2d 506 (8th Cir. 1979)..... 43

Leite v. Kennecott Copper Corp., 558 F. Supp. 1174 (D. Mass.), aff'd, 720 F.2d 628 (1st Cir. 1983).....27,42

Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).....44,45

Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) 18,19

Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. ____, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).....19,21,24,28

Meiri v. Dacon, 759 F.2d 989 (2nd Cir.), cert denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985)..23,24

Meyer v. Riegel Products, 720 F.2d 303 (3rd Cir. 1983), cert. dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984).....47,48,50

McClinton v. Alabama By-Products Corp., 743 F.2d 1483 (11th Cir. 1983)..... 40

Namet v. U.S., 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963).... 28

Needham v. Beecham, Inc., 515 F. Supp. 460 (D.Me. 1981)..... 42

Otstott v. Verex Assur., Inc., 481 F.Supp. 1269 (M.D. Tex. 1980).. 43

Over the Road Drivers, Inc. v. Transport Insurance Co., 637 F.2d 816 (1st Cir. 1980)... 19

Pirone v. Home Ins. Co., 507 F.Supp. 1281 (S.D. N.Y. 1981), aff'd, 742 F.2d 1430 (2nd Cir. 1983)..... 22,23

Posey v. Skyline Corp., 702 F.2d 102 (7th Cir. 1983), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1984)..... 37,39

Quina v. Owens-Corning Fiberglass Corp., 575 F.2d 1115 (5th Cir. 1978)..... 37

Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985)..... 18

Sanders v. Duke University, 538 F. Supp. 1143 (M.D.N.C. 1982)..... 25,42

Smith v. American President Lines, LTD, 571 F.2d 102 (2nd Cir. 1978)..... 43

Sprott v. Avon Products, Inc., 596 F. Supp. 178 (S.D.N.Y. 1984)....42,44,49

Swietlowich v. County of Bucks, 610 F.2d 1157 (3rd Cir. 1979)..... 25

Templeton v. Western Union Telegraph Co., 607 F.2d 89 (5th Cir. 1979)..... 53

Vance v. Whirlpool Corp., 716 F.2d 1010 (4th Cir. 1983).....34,41,43,36

Vaught v. R.R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984)... 37

Wagner v. Sperry Univac, Div. of Sperry Rand Corp., 458 F. Supp. 505 (E.D.Pa. 1978), aff'd, 624 F.2d 1092 (3rd Cir. 1980)..... 43

Welty v. S.F.&G., Inc., 605 F. Supp. 1548 (M.D. Ala. 1985)..... 42

Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042 (10th Cir. 1980)..... 22

Statutes

29 U.S.C. §626.....2, 16,
.....27, 28, 29, 30, 34

29 U.S.C. §627.....3,34,38

Federal Rules

Fed. Rule Civ. Pro. 56.....15, 17,
.....18, 19, 21,, 24, 25, 40

Supreme Court Rule 17.1(a) and (c)..14

Supreme Court Rule 21.1(a) 28

Federal Regulations

29 CFR §1627.10 (1981)..... 34

Other Authorities

House Conf. Rep. No. 95-950, 95th Cong. 2nd Sess., reprinted in 1978 Code & Ad. News 528, 534 29

BRIEF OF THE DAILY PRESS, INC IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of a decision of the United States Court of Appeals for the Fourth Circuit which affirmed the District Court's grants of summary judgment against the Petitioners in favor of Respondent The Daily Press, Inc. ("Daily Press"). Daily Press opposes the issuance of a writ of certiorari to review the decisions of the District Court and Court of Appeals because the decisions below were clearly correct and there is no conflict among the circuits or with this Court's decisions on any issue herein requiring resolution by this Court.

OPINIONS BELOW

The published opinion of the Fourth Circuit is now reported at 826 F.2d 1351 (4th Cir. 1987).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 626(e)(2). For the period during which the Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

STATEMENT OF THE CASE

The Decision of the District Court

On July 1, 1985, Richmond Sullivan (hereinafter referred to as "Sullivan") and Harold A. Morse ("Morse") filed separate actions against Daily Press. By order dated September 13, 1985, the cases were consolidated and both Sullivan and

Morse were granted leave to file Amended Complaints.

In their Amended Complaints, Sullivan and Morse alleged that they were discharged by the Daily Press in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). Both Sullivan and Morse point out that neither filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") within the requisite 180 days after the alleged discriminatory act. They allege that they did not acquire actual knowledge of their rights under the ADEA because of the Daily Press' failure to post the notice called for under 29 U.S.C. § 627, tailure to place the notice at a location of sufficient prominence, and/or failure to post a sufficient number of such

notices. Daily Press renewed its motions to dismiss/motions for summary judgment, asking the District Court to dismiss both Amended Complaints on two grounds: failure to comply with the 180 day EEOC filing requirement and failure to file the actions within the requisite statute of limitations periods.

By order of November 19, 1985, as well as two subsequent orders granting Morse and Sullivan extensions of time up through March 26, 1986, the District Court requested the parties to submit depositions, affidavits and briefs to support their respective contentions on the issue of equitable tolling. Oral Argument was held on July 12, 1986. By memorandum order dated July 17, 1986, the District Court sustained the Daily Press'

motions for summary judgment and dismissed both actions in their entirety.

The Decision of the Court of Appeals

On July 9, 1987, the Court of Appeals affirmed the judgments of the District Court. See 826 F.2d 1351 (4th Cir. 1987). No rehearing was requested and on October 7, 1987, plaintiffs applied for a writ of certiorari to this Court.

Background of the Case

Sullivan was discharged for cause by the Daily Press on June 7, 1982. The next day he executed a Virginia Employment Commission ("VEC") unemployment benefits form, listing his year of birth as 1939. Some time in the three month period between his discharge and September of 1982, Sullivan contacted an attorney named

W. Allen (Skip) Maust ("Maust") about the events surrounding his discharge from the Daily Press. Maust apparently did not advise Sullivan to file a charge with the EEOC. Maust did represent Sullivan at a VEC hearing on Sullivan's claim for unemployment benefits. Following that hearing, Sullivan discussed with Maust the possibility of pursuing a libel action against certain persons who testified at that VEC hearing. No such action was ever filed. Maust billed Sullivan for his services. Moreover, in October of 1982, Sullivan contacted another attorney from Hampton, Virginia, and also related to him the facts surrounding his discharge. No litigation was ever pursued.

Sullivan graduated from the University of Maryland with a degree in American Civilization. While in college he took several journalism courses which covered the basic journalism fundamentals and served as a reporter with the college newspaper. Prior to joining the Daily Press in 1975, Sullivan was employed in a variety of capacities, including a series of journalism-related or public relations positions. While employed with the Daily Press, he attended a two-week seminar sponsored by the American Press Institute which dealt with a number of journalism-type issues.

Sullivan testified in his deposition that discrimination against anyone at any level, whether it be age, race, or sex, is of journalistic

interest to a newsman. In particular, he notes that while employed at the Suffolk News Herald from approximately 1971 to 1975, he found discrimination and civil rights issues to be newsworthy, and, in fact, was considered to be a "liberal radical" for writing articles concerning blacks and for taking up various civil rights issues.

He acknowledges that during this tenure at the Daily Press, he was aware of the existence of minimum wage laws as well as prohibiting race and sex discrimination in employment. Likewise, Sullivan was aware that the newspaper was investigated by the EEOC for alleged race discrimination and had agreed to hire a certain number of blacks.

Sullivan contends that prior to June 7, 1982, he knew nothing about the ADEA and recalls no Daily Press newspaper articles dealing with age discrimination. However, in response to questions regarding an age/sex discrimination case brought against the College of William and Mary by a former basketball coach, Sullivan admitted the case would have been covered by the Daily Press in a fairly heavy fashion and that although he did not thoroughly read about it, he was familiar with the case.[1]

Joanne B. Keating ("Keating") has been continuously employed at the Daily Press as a secretary to the

---

[1] See generally Jacobs v. College of William and Mary, 495 F. Supp. 183 and 571 F. Supp. 791 (E.D. Va. 1980), aff'd, 661 F.2d 922 (4th Cir. 1981).

Personnel Director since November 11, 1974. Her office is located between the Personnel Director's office and the office where employment applications and forms are filled out. This office is open at all times to the Daily Press employees and non-employees alike.

Keating states that there has always been a poster dealing with employment rights conspicuously displayed on the wall beside her desk.[2] There are no other documents

---

[2]The employment rights poster that had been displayed since Keating came to work at the Daily Press was replaced in 1983 with another updated poster. This original poster was destroyed and no one can testify with certainty as to its precise contents. The new poster, which is displayed in the same manner as the earlier poster, is shown in photographs furnished by the Daily Press' Response to Plaintiff's Request

(Footnote Continued on Next Page)

or notices displayed on that particular wall. She testified that persons could freely walk up and read the notice since there was at least 3-4 feet between her desk and the wall where the poster was displayed. Keating had observed persons reading this poster. Although Keating read the original pre-1983 employment rights poster, she cannot with certainty state that it referenced the ADEA. She, however, assumed that it did.

Keating did state that while the EEOC was investigating the Daily Press in regard to the class action racial discrimination suit, during which time

---

(Footnote Continued on Next Page)
for Production of Documents and Answers to Plaintiff's Interrogatories which were filed on or about November 15, 1985.

EEOC personnel were frequently in and out of her office, she was unaware of any comments criticizing the employment rights notice posted there. Also, she was unaware of any instructions from the EEOC to post such notice elsewhere in the Daily Press buildings. She recalls that Sullivan frequently came into the office where the poster was displayed to talk with the Personnel Director. She identified the VEC Decision of the Appeals Examiner, dated September 29, 1982, and pointed out that Maust, Sullivan's attorney, was both present at the unemployment benefits hearing of September 2, 1982, and was forwarded a copy of the Appeals Examiner's final decision.

In an affidavit, Donald Blankenship ("Blankenship"), the

Personnel Director at the Daily Press from March 1, 1982 until January 14, 1985, corroborated Keating's testimony with regard to the display of the employment rights poster.

In response to the Daily Press' motions to dismiss, Sullivan and Maust each filed two affidavits which merely state that during the entire course of his employment at the Daily Press he never observed any posted notice informing them of their rights to be free from age discrimination.

On December 27, 1983, some 567 days after his discharge, Sullivan filed a charge with the EEOC. He was informed by the EEOC of his right to sue by letter dated December 18, 1984. Neither Sullivan nor Morse filed their instant civil actions until July 1, 1985.

Morse was discharged by the Daily Press on September 30, 1982. He did not actually file a charge with the EEOC and instead was merely listed on the charge of discrimination filed by Sullivan on December 27, 1983, some 452 days after his discharge.

REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court's discretionary review of decisions of the United States Court of Appeal by writ of certiorari is generally limited to cases where there is (1) a federal question has been decided in a way that conflicts with applicable decisions of this Court; (2) a conflict among the circuits on the same matter; or (3) an important issue of federal law is presented which has not been, but should be settled by this Court. Supreme Court Rule 17.1(a) and (c).

As more fully discussed hereinafter, the above reasons for granting certiorari are totally absent in the instant cases.

First, the decisions of the courts below are in full accord with previous decisions of this Court on summary judgment under Rule 56.

Second, there is no conflict among the circuits on an issue therein. It is uniformly held that an age discrimination action is time-barred for failure to file a charge of discrimination with the EEOC within the 180 day EEOC filing period or within the requisite 2 or 3 year statute of limitation period, as well as failure to produce sufficient evidence to create the genuine issue of material fact to establish grounds for equitable tolling or estoppel so

as to preclude summary judgment. It is well-established that the administrative tolling provisions of 29 U.S.C. §626 (e)(2) are inapplicable to private civil actions. Likewise, when faced with uncontradicted evidence of a properly posted employment rights notice a plaintiff cannot base his allegation of equitable tolling of the 180 day EEOC filing period upon his statement that he never observed such an employment rights notice. Moreover, an action is time-barred by failure to file an EEOC charge within 180 days after first retaining counsel. Plaintiffs' asserted conflict in decisions from the various circuits on each of these issues is illusory since every such alleged conflict can be reconciled on

factual grounds and distinguished from the instant litigation.

Finally, there is no important question of federal law which has not been, but should be settled by this Court. The Fourth Circuit affirmed the district court's decision based upon its finding that summary judgments were appropriate in these cases. Rule 56 specifically provides that a moving party is entitled to summary judgment when the non-moving party fails to show specific facts creating a genuine issue of material fact for trial. The decisions of the lower courts herein fully accorded with the provisions of Rule 56.

ARGUMENT

I. THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE ENTRY OF SUMMARY JUDGMENT WITHOUT A FULL EVIDENTIARY HEARING BECAUSE PLAINTIFFS FAILED TO PUT FORTH SPECIFIC FACTS SHOWING THAT A

GENUINE ISSUE OF MATERIAL FACT REMAINED FOR TRIAL OR EVIDENTIARY HEARING.

A.

Under Federal Rule of Civil Procedure 56(c) the party moving for summary judgment is responsible for identifying the bases for its motion by showing both the absence of genuine issue of material fact and that it is entitled to judgment as a matter of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). While conflicts in the evidence are resolved in the non-moving party's favor in reviewing the evidence, the court should also consider uncontroverted and unimpeached evidence unfavorable to that party. See e.g. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (summary judgment); Lovelace

v. Sherwin-Williams Co., 681 F.2d 230, 243 n. 14 (4th Cir. 1982) (J.N.O.V.).

To withstand a motion for summary judgment the non-moving party must do more than baldly assert the existence of some factual dispute. Over the Road Drivers, Inc. v. Transport Insurance Co., 637 F.2d 816, 818-820 (1st Cir. 1980). Instead, he must come forward with "specific facts showing that there is a genuine issue for trial." Rule 56(e). In order for an issue of fact to be genuine, non-moving parties such as Sullivan and Morse, "must do more than simply show that there was some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. ___, ___, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). Similarly, the mere existence of a scintilla of evidence in

support of the plaintiff's position, as well as evidence that is merely colorable or is not significantly probative, is insufficient to survive summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. ___, ___, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 212-217 (1986). The plaintiff must present evidence from which the jury could reasonably return a verdict in his favor. Id. As long as the plaintiff has been given an opportunity to conduct discovery, as have these plaintiffs who were given several extensions within which to submit their opposing evidence, this burden of putting forth evidence to defeat summary judgment remains upon the plaintiff even if the evidence deals with the defendant's state of mind or motive or is likely to be within the

exclusive possession of the defendant. Id.

Although the moving party has the initial responsibility, it is not required under Rule 56(c) to support its motion for summary judgment with affidavits or other similar materials negating the plaintiff's various claims. Celotex Corp. v. Catrett, 477 U.S. ___, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Nevertheless, in spite of the current state of summary judgment procedure after this Court's recent decisions in Matsushita Electric, Liberty Lobby and Celotex, plaintiffs would have the Court either ignore or reject these landmark rulings. Plaintiffs emphasize a line of earlier cases which hold that a non-moving party may resist a summary judgment

motion merely by pointing to his pleadings or by citing the movant's failure to produce any controverting evidence. For example, in Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980), the court, like the majority opinion of the D.C. Court of Appeals in Celotex, partially based its decision that summary judgment was inappropriate upon the fact that none of defendant's affidavits controverted the allegations of plaintiff's complaint.[3] As noted

---

[3]Besides Wilkerson, plaintiffs also cite Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982), Aronsen v. Crown Zellerbach, 662 F.2d 584 (9th Cir. 1981), cert. denied, 459 U.S. 1200, 103 S.Ct. 1183, 75 L.Ed.2d 431 (1983), Pirone v. Home Ins. Co., 507 F.Supp. 1281 (S.D. N.Y. 1981), aff'd, 742 F.2d 1430 (2nd Cir. 1983), and Earnhardt v. Com. of Puerto Rico, 691 F.2d 69 (1st Cir. 1982), as

(Footnote Continued on Next Page)

above, such is clearly not the law since the Celotex decision.

In Meiri v. Dacon, 759 F.2d 989 (2nd Cir.), cert denied, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985), the Second Circuit offered this guidance:

> The summary judgment rule would be rendered sterile however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion. Indeed, the

---

(Footnote Continued on Next Page) authorities calling for a full evidentiary hearing before summary judgment in any discrimination case. However, a close reading of these cases reveals that they are distinguishable on their facts. In Hrzenak, the plaintiff "consented" to the evidentiary hearing after which the district judge granted summary judgment against him. In Aronsen, in reversing the entry of summary judgment because a factual dispute still existed, the Ninth Circuit never actually ordered an evidentiary hearing upon remand and instead only called for further factual development. In Pirone, and Earnhardt, the former employees, unlike the plaintiffs here, presented sufficient evidence to create a factual conflict so as to preclude summary judgment.

> salutary purposes of summary judgment - avoiding protracted, expensive and harassing trials - apply no less to discrimination cases than to commercial or other areas of litigation. (citation omitted).

The Mieri court's reasoning certainly applies with equal force to plaintiffs' assertions here that summary judgment is inappropriate here since credibility of witnesses may be implicated in these discrimination cases. Under the Matsushita Electric, Liberty Lobby and Celotex trilogy of cases, credibility of witnesses should not become an issue unless the plaintiffs have first complied with the rigorous Rule 56 requirements of showing facts that create a genuine issue for trial. As with motive or intent, plaintiffs should not be allowed to defeat summary judgment by merely asserting either that

credibility may ultimately become an issue or that in discrimination cases plaintiffs are always entitled to a full evidentiary hearing at the summary judgment stage. To do so would virtually emasculate the effectiveness of Rule 56. Once Sullivan and Morse failed to meet their threshold standard of producing evidence to show a genuine factual dispute, summary judgment was proper and an evidentiary hearing or even full-blown trial totally unnecessary.

Moreover, when, as here, a suit is filed after the limitations period, the plaintiff has the burden to establish that the statute should be tolled. See, e.g., Sanders v. Duke University, 538 F.Supp. 1143, 1146 (M.D.N.C. 1982); Gibbs v. Pepsico, Inc., 25 F.E.P. Cases 661, 662 (E.D. Mich. 1981); Swietlowich

v. County of Bucks, 610 F.2d 1157 (3rd Cir. 1979). In seeking avoidance of the limitations period, all presumptions are against the plaintiff, Akron Presform Mold Co. v. McNeil Corp, 496 F.2d 230 (6th Cir.), cert. denied, 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974).

Here, Sullivan and Morse both admitted this failure to comply with the ADEA time limitations. It is uncontroverted that neither complied with the 180 day filing period nor the 2 year statute of limitations. Sullivan also failed to meet the 3 year limitations period. Thus, the District Court properly entered summary judgment since, as discussed below in more detail in Sections C and D, Sullivan and Morse failed to point to any genuine issue of material fact that

would excuse the statute of limitations.

B.

Relying on Leite v. Kennecott Copper Corp., 558 F.Supp. 1170, 1173 n.1 (D. Mass), aff'd, 720 F.2d 658 (1st Cir. 1983) and Hovey v. Lutheran Medical Center, 516 F.Supp. 554, 556-557 (E.D.N.Y. 1981), the District Court held that the administrative tolling provisions of 29 U.S.C. § 626(e)(2) were not applicable to private civil actions such as the instant cases. Petition at 21a-22a. Accord Fulton v. NCR Corp., 472 F.Supp. 377, 382 (W.D.Va. 1979).[4] Each of

---

[4]Although plaintiffs assigned error to this issue at the Court of Appeals stage, they fail to mention it in their petition. Under well-settled appellate principles, this aspect of

(Footnote Continued on Next Page)

these cases hold that individuals bringing private actions do not benefit from the tolling provided in § 626(e)(2) since that code section speaks only of conciliation by the EEOC and makes no mention of any conciliation efforts which may precede a private ADEA action brought under § 626(c) or § 626(d). Indeed, the legislative history makes it clear that the reference to "informal methods of conciliation, conference, and persuasion pursuant to subsection (b)" is directed solely to those EEOC

(Footnote Continued on Next Page) the District Court ruling will be assumed to be correct and should not be considered by this Court. See Supreme Court Rule 21.1(a); Matsushita Electric, 475 U.S. at ___, 106 S. Ct. at 1352 n.3, 89 L.Ed.2d at 548 n. 2b; Namet v. U.S., 373 U.S. 179, 190, 83 S.Ct. 1151, 1157, 10 L.Ed.2d 278, 286 (1963).

conciliation efforts required under § 626(b) before the EEOC initiates any legal action. See House Conf. Rep. No. 95-950, 95th Cong., 2nd Sess., reprinted in 1978 U.S. Code and Ad. News 528, 534.

The District Court properly construed §626(e)(2) in accordance with the legislative history and case law. Sullivan's claim accrued on June 7, 1982, and it was not until July 1, 1985, some 3 years and 25 days later, that he filed his lawsuit. He failed to file within either the 2 or 3 year statute and the District Court correctly found his action to be time-barred.[5] Morse's claim accrued on

---

[5]For purposes of argument, even if Sullivan were entitled to tolling, he still failed to file his suit within

(Footnote Continued on Next Page)

September 30, 1982 and he did not file his action until July 1, 1985, over two and one half years later. Thus, he too failed to comply with the 2-year limitation period. Furthermore, Morse's action is untimely because he failed to offer any evidence to create a genuine factual issue on his claims of willful ADEA violations.

C.

Morse attempts to excuse his failure to comply with the 180 day filing requirement of §626(d)(1) by relying upon equitable estoppel.

(Footnote Continued on Next Page)
the 2 year period. E.g., Kazanzas v. Walt Disney, 704 F.2d 1527 (11th Cir.), cert. denied, 464 U.S. 982, 104 S.Ct. 425, 78 L.Ed.2d 360 (1983). Since Sullivan did not present sufficient evidence to support the willful ADEA allegations of his Complaint, his action would still be time-barred in its entirety.

However, under the estoppel doctrine, the genesis of the 180 day period is not affected by an employee's alleged lack of knowledge of the discriminatory effects of a particular decision. Felty v. Graves Humphrey Co, 785 F.2d 516, 519-520 (4th Cir. 1985). Instead, equitable estoppel focuses upon whether there has been affirmative misconduct by the employer which lulled the employee into delaying an ADEA filing, such as promise of reinstatement or conditioning his generous severance package upon not discussing the termination with others. See, e.g, Id.; Franci v. Avco Corp., 538 F. Supp. 250, 254 (D. Conn. 1982).

Conversely, unless the employee can present some specific facts showing that a genuine factual dispute exists, equitable estoppel is inapplicable and

summary judgment should be granted. Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 61 (2d Cir. 1986) and cases cited therein; English v. Pabst Brewing Co., 645 F. Supp. 186 (W.D.N.C. 1986), aff'd., 828 F.2d 1047, (4th Cir. 1987). "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed. 2d 196, 202 (1984).

Morse was discharged on September 30, 1982. He and Sullivan filed their joint EEOC charge on December 27, 1983, almost a year and three months later. While arguing for equitable estoppel, Morse has failed to point to any evidence to support the bald allegations of his Complaint that

the Daily Press engaged in activity that somehow misled him into delaying the filing of his ADEA claim. See, English v. Pabst Brewing Co, supra. Instead, he again asserts that the mere existence of a policy of reduction-in-force constitutes a misrepresentation of the reason behind his discharge.

The District Court properly rejected this contention by pointing out that most employers defend discrimination cases by offering nondiscriminatory justifications such as reductions-in-force. Also, it is instructive that courts have failed to hold that standing alone a similar reduction-in-force called for equitable estoppel. See, e.g., Felty, supra. Indeed, when compared with equitable estoppel cases, the facts presented in

the Morse case simply fail to constitute the egregious employer misconduct that warrants equitable estoppel. Accordingly, estoppel is inapplicable here since Morse has failed to prove that he was in any way induced by the Daily Press into failing to timely file his ADEA claim.

D.

Tolling of the 180 day period of § 626(d)(1) may be allowed due to that employer's failure to post the statutory notice required by 29 U.S.C. § 627 and 29 CFR §1627.10 (1981). See, e.g., Vance v. Whirlpool Corp., 716 F.2d 1010, 1013 (4th Cir. 1983).

In contrast, the instant litigation presents uncontradicted evidence in the form of the affidavits and deposition testimony of Keating along with the corroborating affidavit

of Blankenship stating that during their entire periods of employment at the Daily Press a poster setting forth the employment rights was continuously and conspicuously displayed on the wall in the personnel office; that no other documents were placed on that particular wall; that the view of the poster was unobstructed; and that Daily Press employees and the general public had free access to this poster. This is further established by the photographs submitted by the Daily Press which show how the existing poster and its predecessor were displayed.

In response to this specific evidence as to how the notice was posted and maintained, both Sullivan and Morse have submitted several affidavits which generally state that

they never observed any posted notice informing them of their rights. Both have failed to submit any other evidence which would in any way suggest that the Daily Press has not complied with the posting requirement or that the posting of a single notice was somehow inadequate. It is important that neither Sullivan nor Morse presented evidence that they or any other current or former Daily Press employee can testify from personal knowledge that they looked at the wall and that there was no such poster. Likewise, they have failed to present any evidence that the notice did not refer to the ADEA.

Courts have consistently held that where an employee makes a bare assertion that he did not see a properly posted notice, there will be

no tolling of the EEOC filing period.[6] When, as here, there is uncontradicted evidence that the employer posted an employment rights notice in a conspicuous place and without denying that fact the employee only states that he never saw such a notice, no genuine issue as to material fact exists. In

---

[6] See Posey v. Skyline Corp., 702 F.2d 102 (7th Cir. 1983), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1984); Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982); Vaught v. R.R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984); Quina v. Owens-Corning Fiberglass Corp., 575 F.2d 1115 (5th Cir. 1978); Byers v. Follmer Trucking Co., 763 F.2d 599 (3rd Cir. 1985); Downie v. Electric Boat Division, 504 F. Supp. 1082 (D. Conn. 1980); Brudne v. Amalgamated Trust & Savings Bank, 627 F. Supp. 458 (N.D. Ill. 1986); Bomberger v. Consolidated Coal Co., 623 F. Supp. 89 (W.D. Pa. 1985); Butz v. Hertz Corp., 554 F.Supp. 1178 (W. D. Pa. 1983); Keitz v. Lever Bros. Co., 563 F.Supp. 230 (N.D. Ind. 1983); Gibbs v. Pepsico, Inc., supra; English v. Pabst Brewing Co, supra.

fact, at least one post-Anderson v. Liberty Lobby decision has held that this type of cursory response is insufficient to oppose a well-supported motion for summary judgment. See Giles v. Carlin, 641 F.Supp. 629, 635 (E.D. Mich. 1986).

Plaintiffs' elaborate arguments that the notice was not posted in a conspicuous place and that multiple notices must be posted throughout Daily Press' buildings are without merit. The District Court properly pointed out that no case has ever required multiple notices. Petition at 16a. The Court of Appeals emphasized that the statute and regulations refer only to "a notice." 826 F.2d at 1353. Also, single notices have repeatedly been held to be in compliance with the conspicuousness requirement of §627.

See Keitz, supra [outside personnel office], Butz, supra [above desk of city manager's secretary]; Hrzenak, supra [employee lunch room]; Posey, supra [employee lunch room], Byers, supra [trucking company terminal].

Indeed, it is interesting that in Bomberger, supra, the counterpart of Sullivan and Morse cited Aronsen, supra, for the proposition that whenever equitable tolling is in issue summary judgment is inappropriate. However, Aronsen was distinguished by the Bomberger court since Bomberger, like plaintiffs here, had simply not satisfied his initial summary judgment standard of producing sufficient facts for either the equitable tolling or estoppel issue.

Also, Sullivan and Morse never filed any affidavits or submitted any

other evidence creating any genuine issue of material fact supporting their conspicuousness argument. Rule 56(e). Moreover, as noted by the authorities cited above, the only duty imposed by the posting requirements is that the notice be conspicuously posted. Employers are not required to either prove that multiple notices were posted or that the employee in question was ever actually observed reading that notice. "If notice is properly posted and the employee does not see it or sees it, but is still not aware of his rights, there will normally be no tolling of the filing period." McClinton v. Alabama By-Products Corp., 743 F.2d 1483, 1486 (11th Cir. 1984).

II. THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT BECAUSE SULLIVAN'S ACTION WAS TIME-BARRED DUE TO HIS FAILURE TO

FILE HIS EEOC CHARGE WITHIN 180 DAYS OF FIRST RETAINING COUNSEL.

Where there is equitable tolling of the 180 day filing requirement, that time period expires within 180 days of the time the employee either retains an attorney or acquires actual knowledge of his rights under the ADEA. See e.g. Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 515 F.2d 1195, 1198 (5th Cir. 1975); Vance v. Whirlpool Corp, 716 F.2d at 1013.

The overwhelming majority of cases hold that equitable modification of the applicable EEOC limitations period is inappropriate when, as was the case with Sullivan, the employee has been represented by or has consulted counsel

within that EEOC filing period.[7] Likewise, even in cases that involve equitable tolling, that tolling ceases and the limitations period for filing with the EEOC begins to run when the

---

[7] See, e.g., Edwards v. Kaiser Aluminum and Chemical Sales, Inc., 525 F.2d at 1200 n. 8; Downie v. Electric Boat Division, 504 F.Supp. at 1086-1087; Sanders v. Duke University, 538 F. Supp. at 1146 n. 2; Keyse v. California Texas Oil Corp., 590 F.2d 45, 47-48 (2nd Cir. 1978); Welty v. S.F.&G., Inc., 605 F. Supp. 1548, 1560-1564 (M.D. Ala. 1985); Albano v. General Adjustment Bur., Inc., 478 F. Supp. 1209, 1215 (S.D.N.Y. 1979), aff'd, 622 F.2d 572 (2nd Cir. 1980); Needham v. Beecham, Inc., 515 F. Supp. 460, 467-468 (D.Me. 1981); Bennett v. Russ Berrie & Co., Inc., 564 F. Supp. 1576, 1580-1581 (N.D. Ind. 1983); Comfort v. Rensselaer Polytechnic Institute, 575 F. Supp. 258, 261 (N.D.N.Y. 1983); Cole v. CBS, Inc., 634 F. Supp. 1558, 1564 (S.D.N.Y. 1986); Sprott v. Avon Products, Inc., 596 F. Supp. 178; 182-183 (S.D.N.Y. 1984); Leite v. Kennecott Copper Corp., 558 F. Supp. at 1174.

employee simply retains or consults counsel following his discharge.[8]

The mere ignorance of legal rights does not toll a statute of limitations. See, e.g., Larson v. American Wheel and Brake, Inc., 610 F.2d 506, 510 (8th Cir. 1979); Wagner v. Sperry Univac, Div. of Sperry Rand Corp., 458 F. Supp. 505, 515 (E.D.Pa. 1978), aff'd, 624 F.2d 1092 (3rd Cir. 1980). Furthermore, a discharged employee like Sullivan cannot avoid responsibility for his noncompliance with EEOC filing deadlines by claiming ignorance of the law or complaining of the actions or omissions of his attorney. Edwards,

---

[8] See, e.g., Vance, 716 F.2d at 1013; Smith v. American President Lines, LTD, 571 F.2d 102, 109-110 (2nd Cir. 1978); Otstott v. Verex Assur., Inc., 481 F.Supp. 1269, 1271 (M.D. Tex. 1980).

supra; Albano, supra; Downie, supra; Keyse, supra; Sprott, supra. Accord Hay v. Wells Cargo, Inc., 596 F. Supp. 635, 642 (D. Nev. 1984).

The principal authority relied upon by the Downie, Albano, and Hay courts is this Court's decision in Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). There, the plaintiff complained that the involuntary dismissal of his case under such circumstances unduly penalized him for the conduct of his counsel. In affirming that dismissal, the Supreme Court explained with the following language which is certainly responsive of Sullivan's argument regarding the harshness of this rule upon both employees and their attorneys:

> Petitioner voluntarily chose this attorney as his representative in

> the action, and he cannot now avoid consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." (citation omitted).

370 U.S. at 633-634, 82 S.Ct. at 1390, 8 L.Ed.2d at 740. Accord Davis v. United Fruit Company, 402 F.2d 328 (2nd Cir. 1968), cert. denied, 393 U.S. 1085, 89 S.Ct. 869, 21 L.Ed.2d 778 (1969). Similarly, in the ADEA case of Jacobson v. Pitman-Moore, Inc., 624 F.Supp. 937, 942-3 (D. Minn. 1985), aff'd, 786 F.2d 1172 (8th Cir. 1986), the court acknowledged that even if its ruling may lead to a legal malpractice claim against the plaintiff's attorney, it must be the plaintiff, not her former employer, who ultimately bears

responsibility for the deficiencies of the attorney of her choice.

The District Court correctly noted that Sullivan totally ignores the "or retains an attorney" language of Vance, when he contends that constructive knowledge of his ADEA rights should not be imputed to him because he only consulted the two attorneys for unemployment compensation and libel issues. Petition at 19a-20a. Likewise, in Downie v. Electric Boat, supra, the court squarely rejected the employee's argument that following his discharge the attorneys had merely focused on securing the employee's health benefits, not a possible ADEA claim. To the same effect is Edwards, supra, where tolling of the 180 day deadline was denied when the discharged employee had also consulted two

attorneys, one of which was within the 180 day period. In explaining its ruling, the Fifth Circuit offered this cogent observation:

> While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

Edwards, 515 F.2d 1200 n. 8.

While contending that a split of authority exists, the sole authorities cited on petition in support of Sullivan's contention that the courts below erred in imputing constructive knowledge of the ADEA to him through his attorneys are the cases of Meyer v. Riegel Products, 720 F.2d 303 (3rd Cir. 1983), cert. dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984) and Dartt v. Shell Oil Co., 539 F.2d

1256 (10th Cir. 1976), aff'd by an equally divided court, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977), reh. denied, 434 U.S. 1043, 98 S.Ct. 600, 54 L.Ed.2d 792 (1978). Petition at 22.

In Meyer, the court allowed equitable estoppel even though the plaintiff had consulted and retained an attorney within several weeks after his discharge. The Third Circuit distinguished the majority line of cases by pointing out that unlike those cases the plaintiff was not arguing for equitable tolling due to his ignorance of the law, but equitable estoppel due to certain misrepresentations by the employer, which Sullivan has been unable to prove here. In Dartt, the plaintiff's initial contact with an attorney was only "... a preliminary approach to a possible consultation..."

538 F.2d at 1261. The Dartt decision has been held to be of questionable precedential value by several courts for a number of reasons.[9] For one thing, the affirmance by an evenly divided U.S. Supreme Court prevents that Dartt from becoming a binding national precedent. Furthermore, Sullivan's retention of an attorney within less than 3 months after his termination certainly cannot be deemed the mere "preliminary approach [to attorney] as to possible consultation" found in Dartt. Keyse, 590 F.2d at 47-48 n. 2.

---

[9] See, Keyse, 590 F.2d at 47-48 [tolling denied where pro se appellant was represented by counsel within EEOC filing period and relied upon that attorney's misinformation]; Sprott, 596 F.2d at 183 [tolling denied where plaintiff relies upon erroneous advice of counsel].

Clearly, the Meyer and Dartt cases are based upon factors which are not present here and completely ignore the overwhelming majority of cases on the attorney consultation/tolling issue. First, Sullivan consulted and retained an attorney as early as September 2, 1981, less than 3 months after his discharge. In addition, he contacted still another unnamed attorney in October of 1982 about possible further claims. Both attorney contacts were well within the initial 180 days immediately following Sullivan's discharge. Second, Sullivan lacked diligence in pursuing his claims since he waited over one year after first consulting counsel and some 567 days after discharge before filing his EEOC charge. Third, the Daily Press was clearly prejudiced by Sullivan's delay

in filing his EEOC charge inasmuch as the Daily Press was not promptly notified of this discrimination claim and, as a result, will be hindered in that it will not be possible to resolve Sullivan's dispute upon fresh recollections. See, e.g., Greene v. Whirlpool Corp., 708 F.2d 128, 130 (4th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 1707, 79 L.Ed.2d 171 (1984).

Indeed, it is inconceivable on these facts that Sullivan was not aware of his rights under the ADEA even before his discharge from the Daily Press. This is especially true if one were to believe the events surrounding his discharge that Sullivan sets forth in his petition at pages 3-4. Sullivan testified that he had developed a reputation for covering civil rights

issues while employed with the Suffolk newspaper and that discrimination of any type be it age, sex or race, was of a special interest to a newsman. He also testified that during this tenure at the Daily Press he was familiar with a newsworthy age discrimination case which was heavily covered in that area by the Daily Press; that he was aware of the existence of minimum wage laws and laws prohibiting sex and race discrimination in employment; and that he knew that the Daily Press was under investigation by the EEOC. It stretches credibility to believe that a veteran newsman who has such extensive knowledge of civil rights, discrimination, and employment-related issues knew nothing about the ADEA.

Furthermore, a discharged employee who has the means of acquiring actual

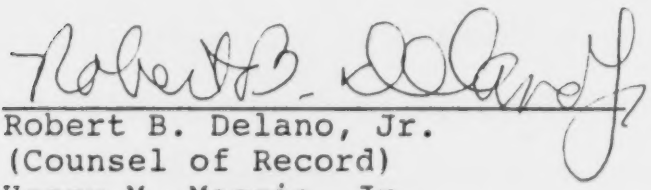
or constructive knowledge of his ADEA rights should not be allowed to obtain equitable tolling merely by complaining of his employer's failure to fully comply with the posting requirements of § 627. Templeton v. Western Union Telegraph Co., 607 F.2d 89, 91 (5th Cir. 1979).

Therefore, since Sullivan failed to file his charge with the EEOC within 180 days of first retaining an attorney or acquiring actual knowledge of his rights under the ADEA and since he retained that attorney well within the 180 day period following his discharge, the District Court properly rejected Sullivan's request for equitable tolling of the 180 day limitations period.

CONCLUSION

For all of the foregoing reasons and authorities, the Court of Appeals correctly concluded that the district court's granting of defendants' motions for summary judgment was appropriate. The petition for writ of certiorari, therefore, should be denied.

Respectfully submitted,



Robert B. Delano, Jr.
(Counsel of Record)
Henry M. Massie, Jr.
SANDS, ANDERSON, MARKS & MILLER
801 East Main Street
Richmond, Virginia 23216-1998
804/648-1636

Gregory P. Schermer
HANSON, O'BRIEN, BIRNEY & BUTLER
888 Seventeenth St., N.W.
Washington, D.C. 20006
202/398-6161

Counsel for Respondent
The Daily Press, Inc.

FILING AND MAILING CERTIFICATE OF PRINTER

I hereby certify that on this 5th day of November, 1987, I mailed via First Class Certified mail 40 copies of this Brief in Opposition to the Clerk's Office of the Supreme Court of the United States and mailed the required copies of this brief via First Class Mail to Counsel for Petitioners at the following addresses:

FREDERICK E. POPOVITCH
POPOVITCH & POPOVITCH, ESQS.
1601 Bay Avenue
Post Office Box 27
Point Pleasant, NJ 08742

BERNARD J. DiMURO
HIRSCHKOP & ASSOCIATES, P.C.
108 N. Columbus Street
Post Office Box 1226
Alexandria, VA 22313

Michael I. Hudgins

Appellate Printing Services
Heritage Building
10th and Main Streets
Richmond, VA 23219

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-575

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

HAROLD A. MORSE, Petitioner

v.

THE DAILY PRESS, INC., Respondent

RICHMOND SULLIVAN, Petitioner

v.

THE DAILY PRESS, INC., Respondent

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

---

*FREDERICK E. POPOVITCH, ESQ.
POPOVITCH & POPOVITCH, ESQS.
1601 Bay Avenue, P.O. Box 27
Point Pleasant, New Jersey 08742
201/295-1600

BERNARD J. DiMURO, ESQ.
HIRSCHKOP & ASSOCIATES, P.C.
108 N. Columbus St., P.O. Box 1226
Alexandria, Virginia 22313
703/836-6595

Counsel for Petitioners

*Counsel of Record

TABLE OF AUTHORITIES

Cases — **Pages**

Butz v. Hertz Corp., 554 F.Supp. 1178 (W.D.Pa. 1983)..... 7

Celotex Corp. v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)..... 2,3

English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987)... 5,6

Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982)..... 5

Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)..... 8

Meyer v. Riegel Products, 720 F.2d 303 (3rd Cir. 1983), cert. dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984)..... 9

Posey v. Skyline Corp., 702 F.2d 102 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983)..... 6

Wilkerson v. Siegfried Ins. Agency, 621 F.2d 1042 (10th Cir. 1980).... 3,4,5

Statute

29 U.S.C. Section 627..... 5,6

PETITIONERS' REPLY MEMORANDUM

From a reading of The Daily Press, Inc.'s Brief in Opposition to the Petition for a Writ of Certiorari, it is clearly evident that The Daily Press, the employer in this ADEA case, has had great difficulty in identifying and responding to the two issues presented by the petitioners, Morse and Sullivan. Throughout its Brief, The Daily Press consistently refers to and discusses, often at length, irrelevant facts and arguments not raised in the Petition.[1] This leads to the strong suspicion that such extensive use of irrelevancies was deliberate and was an attempt to confuse the real issues presented.

[1] Some examples of irrelevant facts and non-issues are: constant reference to Section 626(e)(2), see pp. i, iv, 2, 16, and 27-30; irrelevant personal data on Sullivan, see pp. 7-8; failure to post

(Footnote continued next page)

In response to the few legal arguments, which could be considered reasonably related to the issues presented, The Daily Press' first contention concerns its interpretation of the relationship between this Court's holding in Celotex Corp. v. Catrett, 477 U.S. _____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and the 10th Circuit's holding

_____

(Footnote 1 continued from prior page) multiple notices, see pp. 38-40; non-observance of notice, see pp. 35-38; mere ignorance of law as no excuse to permit equitable modification, see pp. 43-44; its repeatedly illogical conclusion that because Sullivan admitted that he was aware of civil rights issues, specifically race and sex discrimination issues, he therefore had to be aware of the age discrimination law in spite of the undeniable fact that they are separate laws, passed at different times and represent different types of discrimination, see pp. 7-9, 51-52; and last, but not least, its convoluted argument not accepted by either lower court, that any knowledge about a local age (and sex) discrimination case constructively imputes knowledge of the age discrimination law and its provisions to Sullivan. See pp. 7-9, 51-52.

in Wilkerson v. Siegfried Ins. Agency, 621 F.2d 1042 (10th Cir. 1980). See Brief in Opposition at 22-23. The Daily Press contends that the ruling in Celotex negates the decision in Wilkerson because that court partially based its decision on the fact that none of the defendant's affidavits controverted allegations in the plaintiff's complaint that the reasons given for plaintiff's discharge were pretextual. The Daily Press' contention is without foundation. This Court in Celotex held that the moving party in a Rule 56, or summary judgment motion, is not required to support its motion with affidavits or other materials negating the nonmoving party's claim, where the nonmoving party has failed to show that there is a genuine issue of fact. In the Wilkerson case, the moving party filed affidavits in support of its motion;

however, that court found that those affidavits did not negate an issue of material fact, i.e., that the plaintiff had been discharged for pretextual reasons. Since an issue of fact existed, that court properly denied summary judgment, and remanded the case for a hearing on the question of equitable tolling. Wilkerson, 621 F.2d at 1045.

The Daily Press' real response to the issue of an evidentiary hearing for questions of equitable modification of time limitation periods in ADEA cases can be found in a footnote. See Brief in Opposition, note 4 at 22-23. The brevity of this response and the lack of explanation as to the significance of The Daily Press' observations on the cases make further discussion by petitioners generally unnecessary. Suffice it to say

that in Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714 (8th Cir. 1982), there was an evidentiary hearing.

The Daily Press' argument in response to Morse's equitable tolling argument is misplaced since it relies on the wrong standard by misidentifying the basis of Morse's position as "equitable estoppel." "Equitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987). For example, equitable tolling would apply where there is a question of pretextual reasons given for a discharge, see, e.g., Wilkerson v. Siegfried Ins. Agency, Inc., 621 F.2d 1042 (10th Cir. 1980), or where there is a question of failure to post the notice conspicuously as required by 29 U.S.C.

Section 627, see, e.g., Posey v. Skyline Corp., 702 F.2d 102 (7th Cir.), cert. denied, 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983).

"Equitable estoppel applies where, despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline." English, 828 F.2d at 1049. In the present case, since the plaintiffs have consistently denied any knowledge of their ADEA rights during the time limitation periods, equitable estoppel is inapplicable. However, as was the case at the District Court level in English, parties (and sometimes courts) often incorrectly use the terms interchangeably. Id.

As to the notice issue presented to this Court by petitioners, The Daily Press

responds by failing to focus on the crux of that issue, where the notice was posted, and the petitioners' contention that the wall of an interior office was not a conspicuous place as required. However, it is interesting to note that in its discussion of the non-issue of the posting of multiple notices, The Daily Press cites a list of cases, indicating where the notice was posted in each. See Brief in Opposition, at 39. Apparently, it failed to observe that none of those cases involved posting of a notice in an interior office,[2] the real point at issue here.

In response to the issue of consultation of an attorney during the

[2] In Butz v. Hertz Corp., 554 F. Supp. 1178 (W.D.Pa. 1983), which The Daily Press included in the list mentioned above, the notice was posted on a bulletin board in the open office area in the main office building above the desk of the city manager's secretary. Id. at 1181.

time limitation periods of the ADEA as an absolute bar to equitable modification, The Daily Press appears to rely on this Court's decision in Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) and quotes from that case. See Brief in Opposition at 44-45. However, the Link case is not even slightly factually or procedurally similar to the present case. In Link, this Court upheld the District Court's imposition of the involuntary dismissal of the case, as a sanction for the attorney's failure to prosecute the case during the six years it was before that court. The attorney's failures culminated in a failure to appear at the pretrial conference, and this led directly to the dismissal. Under all of the circumstances in that case, the dismissal was affirmed.[3]

[3] It should be noted that there was a strong dissent by Justice Black.

In the present case, Sullivan consulted an attorney specifically to defend his rights in his unemployment benefits case which was being contested by The Daily Press -- circumstances which The Daily Press has failed to address in its rendering of the facts of the case.[4] See Brief in Opposition at 5-6.

The Daily Press attempts to distinguish Meyer v. Riegel Products, 720 F.2d 303 (3rd Cir. 1983), cert. dismissed, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984), but this represents another failure. In Meyer, it points out that the equitable modification required was "due to certain misrepresentations by the employer, which Sullivan has been unable

[4] Sullivan consulted a second attorney only to determine if a libel action could be filed based on the statements of The Daily Press' representatives who testified at the unemployment benefits hearing.

to prove here." Brief in Opposition at 48. Of course, at this stage in the present case, Sullivan is under no obligation to prove his claim. What The Daily Press fails to address is the real issue raised in this case, i.e., the broad application of the rule that any consultation with an attorney is an absolute bar to equitable modification. Simply arguing that a majority of courts accept this rule is not responsive to the issue.

In its response, The Daily Press has not denied the importance and substantiality of the questions presented in this case by either obfuscation or ignoring them. In light of its inability to face the issues as presented in the petition, except by resort to inadequate legal arguments frequently supported by inappropriate legal authorities, Morse and

Sullivan's Petition for a Writ of Certiorari is actually strengthened, and petitioners suggest that a summary reversal is in order.

Respectfully submitted,

FREDERICK E. POPOVITCH
POPOVITCH & POPOVITCH
1601 Bay Avenue
P.O. Box 27
Point Pleasant, NJ 08742
(201)295-1600
Counsel of Record
for Petitioners

November 18, 1987